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Native Americans and the Free Exercise Clause

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NATIVE AMERICANS AND THE FREE EXERCISE CLAUSE

> [T]he right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion . . . .[1]

The term Native American is as broad a designation as the term European, for it encompasses members of numerous different nations and tribes. Each tribe has its own traditions, culture, and religion. This note will not attempt to provide even a general overview of Native American religious practices but will deal only with those practices which have come in conflict with state and federal laws in areas not under the jurisdiction of tribal governments.[2] The central issue will be the degree of protection which has been afforded these Native American religious practices under the free exercise clause of the first amendment.[3] The examination will indicate that various state and fed-

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1. People v. Woody, 61 Cal. 2d 716, 727, 394 P.2d 813, 821-22, 40 Cal. Rptr. 69, 77-78 (1964).

2. In another area the first amendment has been interpreted in a uniform but surprising manner. Surprisingly, the courts have consistently held that the first amendment does not apply to tribal governments. The Bill of Rights was originally interpreted as applying only to the federal government and not to the state governments. Barron v. Mayor & City Council, 32 U.S. 243 (1833). Later it was held that the due process clause of the fourteenth amendment made the restrictions of the first amendment applicable to the states. Cantwell v. Connecticut, 310 U.S. 296 (1940). But because reservations and tribal governments have a unique position within our national structure, independent of the federal government but also not a state, several decisions have held that the first amendment is not applicable to them. As one court noted: "No provision in the Constitution makes the first amendment applicable to Indian nations nor is there any law of Congress doing so. It follows that neither, under the Constitution or the laws of Congress, do the Federal courts have jurisdiction of tribal laws or regulations, even though they may have an impact to some extent on forms of religious worship." Native American Church v. Navajo Tribal Council, 272 F.2d 131, 135 (10th Cir. 1959). *See also* Oliver v. Udall, 306 F.2d 819 (D.C. Cir. 1962); Toledo v. Pueblo De Jemez, 119 F. Supp. 429 (D.N.M. 1954).

3. An important distinction between Native American religious practices and other religious practices needs to be considered when any comparison is made. In the

eral courts have been inconsistent in dealing with identical practices. While some of the variation in results may be attributable to factual differences in the cases, two determinative factors appear to be (1) what the court understood to constitute a bona fide religious belief and (2) the weight which the court attached to the public interest the state was seeking to protect.

The note will first discuss the United States Supreme Court's interpretation of the free exercise clause of the first amendment and the balancing test which it has developed in applying the clause to specific factual situations. The discussion will then turn to an examination of the conflicts which have arisen among state and federal courts in applying this standard to Native Americans in the areas of peyote, hair length, and animal protection. The note will conclude that because of the inconsistencies between the various state and circuit courts, the United States Supreme Court should clearly articulate the standard to be applied in cases involving Native American religious practices and first amendment guarantees.

The Free Exercise Clause

It is well established that the free exercise of religion guaranteed by the first amendment is not unlimited. While freedom of belief is absolute, the practice of those beliefs may be regulated. The first case which considered the free exercise clause and established this distinction was *Reynolds v. United States.*[4] In *Reynolds* members of the Mormon Church, which at that time required polygamy, challenged the constitutionality of a federal law which prohibited the practice. The Supreme Court upheld the statute reasoning that while Congress had been deprived of the power to regulate belief, it still had the power to forbid religious practices which were subversive of the "good order" of society. Examining the practice of polygamy, the Court found it to be destructive of democracy and therefore within the power of Congress to forbid.[5]

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dominant American society a clear distinction is made between a religious practice like worship and a secular practice like professional sports. In traditional Native American culture no such distinction exists. Religion permeates every practice of daily life. Culture defines religion in our contemporary society while religion defines culture in the traditional Native American society. This basic distinction becomes crucially important when any particular Native American religious practice is examined by the courts. What might seem to be of only minimal religious importance to the occidental mind is often extremely important to the total religious system of a Native American. In fact, the mere labeling of some practice as cultural and not religious imposes an occidental prejudice which seriously affects the outcome of any court's decision. *See generally*, V. DELORIA, GOD IS RED 247-71 (1973).

4. 98 U.S. 145 (1878).

5. *Id.* at 165-66.

Recent cases have placed limits on the states' power to regulate religious practices in the interest of "good order." The Supreme Court has applied a balancing test in which the interest of the state in regulating a religious practice is weighed against the practitioner's interest in the free exercise of his religion. One case which carefully delineates the balancing test is *Sherbert v. Verner*.[6] In *Sherbert* a Seventh-Day Adventist had been denied state unemployment compensation on the ground that she had refused to accept employment. The appellant claimed that her religious beliefs precluded her from accepting any position which required her to work on Saturday (her Sabbath). The Supreme Court held that the state's denial of unemployment benefits to the appellant unconstitutionally infringed on the free exercise of her religion. The Court reasoned that before the state may restrict some religious practice some compelling state interest must outweigh the individual's interest in religious freedom. In order for the state's interest to be compelling, the Court stated:

> [N]o showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[7]

Rejecting the state's claim that allowing a first amendment exemption from the requirement that claimants be willing to accept Saturday employment would lead to the filing of spurious claims, the Supreme Court stated that the state had the burden of demonstrating "that no alternative forms of regulation would combat such abuses without infringing first amendment rights."[8]

While *Sherbert* places the burden of proof on the state to demonstrate both a compelling state interest in the regulation of a religious practice and the absence of less restrictive alternatives before a regulation will withstand a constitutional test, other Supreme Court cases have held that the individual claiming that a regulation infringes on the free exercise of his religion must establish that his beliefs are held in good faith[9] and that the regulated conduct is part of the practice of his religion.[10]

In *United States v. Ballard*,[11] the defendants, husband and wife leaders of the "I Am" movement, were convicted in a federal district court of mail fraud for soliciting funds through the mails while claiming that they were communicating with Jesus, had to power to heal incurable diseases, and would impart divine messages to the world. The

6. 374 U.S. 398 (1963).
7. *Id.* at 406 (citations omitted).
8. *Id.* at 407.
9. United States v. Ballard, 322 U.S. 78 (1944).
10. Wisconsin v. Yoder, 406 U.S. 205 (1972).
11. 322 U.S. 78 (1944).

trial court had carefully instructed the jury that the truth or falsity of the defendants' beliefs was not to be considered and that the jury was to confine itself to deciding whether or not the defendants held their beliefs in good faith.[12] On appeal the defendants objected to this limitation, claiming that they should have had the opportunity to prove the truth of their teachings. The Ninth Circuit Court of Appeals reversed, holding that restricting the issue to the question of good faith was error.[13] The Supreme Court reversed the court of appeals, holding that permissible judicial inquiry is properly limited to a determination of whether a claimant holds a belief in good faith or is merely using the religious claim as a shield for his illegal activities. An inquiry into the theological merits of a claimant's beliefs was held to be foreclosed by the first amendment. As the Court put it:

> [W]e do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury. Whatever this particular indictment might require, the First Amendment precludes such a course . . . . Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.[14]

From *Ballard* it is clear that an individual claiming that the practice of his religion is protected by the free exercise clause does not have to establish that his beliefs are theologically sound but only that he holds them in good faith.

The free exercise clause guarantees freedom of *religion*, and recent decisions by the Supreme Court have indicated that this term will be strictly construed. Thus, if an objection to a state regulation is to succeed, the claimant must demonstrate that the regulation interferes with the free exercise of his religion. Nonreligious objections to state regulations, including those based on ethical and cultural grounds, are not entitled to first amendment protection.

The issue of what constituted a religious belief entitling the claimants to protection under the free exercise clause was discussed by the Supreme Court in *Wisconsin v. Yoder*.[15] In *Yoder*, members of the Amish church had been convicted under a state law which required children to attend school until they were sixteen. The defendants allowed their children to attend public school through the eighth grade but objected to higher education on the grounds that the values taught in public schools endangered their children's salvation. The Supreme Court stated:

12. Part of the court's instruction to the jury was as follows: "The issue is: Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted. I cannot make it any clearer than that." *Id.* at 81.

13. Ballard v. United States, 138 F.2d 540 (9th Cir. 1943).

14. 322 U.S. at 86 (citations omitted).

15. 406 U.S. 205 (1972).

> [T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.[16]

However, the Court did not articulate any standard which other courts could use in deciding whether or not a belief was in fact "religious." Instead, it confined itself to an analysis of the facts of the case before it. Noting both the Biblical foundation which the parents claimed for their belief and the fact that an organized group, with an established life style, supported the individual claimants, the Court found that the defendants' objections were based on religious beliefs.[17] Concluding that the impact of the state regulation on the defendants' exercise of their religion was severe, the Court held that the defendants' interest in the free exercise of their religion outweighed the state's interest in the regulation and that therefore the statute, as applied to these defendants, was unconstitutional.[18]

These cases indicate that the Supreme Court has developed a four-part test which will be used to determine if a state statute unconstitutionally infringes on the free exercise of an individual's religion.[19] First, it must be established that the religious beliefs are held in good faith.[20] Second, if the conduct is to be protected it must be part of the practice of the religion.[21] Third, the religious importance of the conduct must be balanced against any compelling state interest in its regulation.[22] Fourth, for the regulation to be upheld it must be the least restrictive means of accomplishing the state's compelling interest.[23] Thus, if a statute is determined to infringe upon the free exercise of an individual's religion, the extent of that infringement is

16. *Id.* at 215-16.
17. *Id.* at 216-17.
18. *Id.* at 234.
19. Controversies concerning the free exercise clause actually follow two distinct patterns. Some cases involve a state regulation which requires some action on the part of the individual and the individual objects, claiming that his religion requires him to abstain from such action. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972). Other cases involve a state regulation which forbids some action on the individual's part and the individual objects, claiming that his religion requires that he perform the activity. *E.g.*, People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). However, while the patterns in the two types of cases are distinct, the same test is applied in both.
20. 322 U.S. 78 (1944).
21. 406 U.S. 205 (1972).
22. 374 U.S. 398 (1963).
23. *Id.*

balanced against the weight of the society's interests in enforcing the regulation.[24]

Although this four-part test appears to present a clear standard for lower courts to follow, one aspect of the test remains unclear. While the Supreme Court's decision in *Yoder* emphasizes that only religious practices are protected under the free exercise clause, neither the *Yoder* decision nor any other Supreme Court decision attempts to define the meaning of the terms "religious" or "religion." The problem is further complicated by the fact that in *Yoder* the existence of an organized group with an historically successful life style was cited by the Court as supporting the finding that the defendants' assertions were in fact religious.[25] This language can be read as implying a new test: in order for a practice to be deemed religious, historical and cultural support for the practice must be established. The remaining ambiguity regarding the meaning of the terms "religion" and "religious" seriously weakens the guidance which is furnished to lower courts.

An examination of cases involving claims of violations of religious freedom affecting Native Americans reveals that the Supreme Court's standards have not been uniformly interpreted or applied. In order to facilitate comparison and minimize factual distinctions, the cases will be discussed in three subject matter groupings: cases involving the use of peyote and the Native American church, cases concerning regulation of hair length, and cases involving animal protection regulations.

Peyote

While older cases held that a Native American's use of peyote was not protected by the first amendment, recent cases in state courts have held that the use of peyote is protected from state regulation if used in the exercise of a bona fide religious belief. However, conflict exists concerning what an individual claiming protection under the free exercise clause must establish in order to be protected. One state has required that a Native American who uses peyote belong to the Native American church while another state has refused to grant legal recognition to the church. Finally, one circuit court has held that due

24. While this note is confined to a discussion of the free exercise clause, several of the cited cases also include discussions of the establishment clause. A different test is used to determine if there has been an infraction of the establishment clause. In order for a state regulation to stand when it is challenged as violating the establishment clause, three criteria must be satisfied. First, the purpose of the statute must be the regulation of some legitimate secular interest of the state. Second, the effect of the statute on religion must be neutral, neither advancing nor retarding religion in general. Third, the statute must not bring about excessive governmental entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

25. 406 U.S. at 216-18.

process does not require a prearrest determination that a defendant possessing peyote was not acting in the exercise of a bona fide religious belief.

History of Peyote Usage

The history of Native American use of peyote, *Lophophora williamsii*, is obscure to the dominant society, but anthropologists agree that it was used by several Mexican tribes before the coming of Columbus.[26] The first written record of usage by Native Americans within the United States was in 1716.[27] While the experts do not agree on the course of the spread of the religious use of peyote among American tribes, some have argued that its spread was accelerated by the intertribal contacts established when members of different tribes served in the United States armed forces in World War I.[28] In any event, by 1940 the religious use of peyote was established in at least fifty different tribes within the United States.[29]

A typical peyote meeting includes prayer, song, and the ingestion of peyote in sufficient amounts to induce visions.

> At an early but fixed stage in the ritual the members pass around a ceremonial bag of peyote buttons. Each adult may take four, the customary number, or take none. The participants chew the buttons, usually with some difficulty because of extreme bitterness . . . .[30]

The meeting usually lasts from sunset to sunrise. By sunrise the effects of the peyote have worn off and the participants depart.

Conflict Among The State Courts

One of the earliest cases to challenge a state regulation on the grounds that it violated the free exercise clause was *State v. Big Sheep*.[31] In *Big Sheep* the defendant was a member of the Crow tribe who was arrested within the reservation for possessing peyote in violation of a state statute. Appealing his conviction for unlawful possession of peyote to the Supreme Court of Montana, the defendant claimed that the lower court erred in not allowing him to prove that he was a member of the Native American church and that the church's "sacramental" use of peyote was protected under the first amendment. Because the court remanded the case for a new trial to determine certain juris-

26. W. LaBARRE, THE PEYOTE CULT 109 (1970).

27. *Id.* at 110.

28. *See generally* Note, *Peyote and The Native American Church*, 2 AM. INDIAN L. REV. 71 (1974).

29. W. LaBARRE, THE PEYOTE CULT 122 (1970).

30. 61 Cal. 2d 716, 721, 394 P.2d 813, 817, 40 Cal. Rptr. 69, 73 (1964).

31. 75 Mont. 219, 243 P. 1067 (1926).

dictional questions involving the reservation, it did not directly rule on the merits of the defendant's first amendment claims. Dicta in the decision, however, emphasized that while the lower court should determine if the defendant had the peyote in his possession in accord with a bona fide religious belief, that in itself would not constitute a defense. Reviewing the precedents in the United States Supreme Court, the Montana court stated:

> [I]t was never intended or supposed that the first amendment to the Constitution . . . should be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society.[32]

One of the factors which caused the court to attach little weight to the defendant's first amendment claims appears to stem from the court's theological differences with the defendant.[33] The court characterized the defendant's beliefs as the product of an erroneous interpretation of certain Biblical passages. Since the decision in *Big Sheep*, the Supreme Court has held that judicial inquiry into the theological merits of an individual's religious beliefs is foreclosed by the first amendment.[34] Therefore, the Montana court might not adopt the same approach in a similar case today, but *Big Sheep* has yet to be overruled.

Two recent cases, using a balancing test, have given protection to the Native Americans' use of peyote under the free exercise clause. The first reported case so holding was *People v. Woody*.[35] The defendants in *Woody* were Navajos who were arrested while engaging in a peyote ritual in a hogan made of railroad ties. Police officers observed the defendants through cracks between the railroad ties and charged them with violating a state regulation prohibiting possession of peyote. Although the district attorney stipulated that at the time of the arrest the defendants were using peyote in a religious ceremony, the trial court, without a jury, rejected the defendants' first amendment claims. The California Supreme Court reversed the conviction. In reaching its result, the court relied heavily on the United States Supreme Court's decision in *Sherbert v. Verner* which held that for a

32. *Id.* at 239, 243 P. at 1073, *citing* Davis v. Beason, 133 U.S. 333 (1890).

33. In fact, the court engaged in an argument over the defendant's interpretation of scripture: "We do not find peyote or any like herb mentioned by Isaiah, or by Saint Paul . . . nor does it seem from the language employed that Saint John the Divine had any such in mind." *Id.*

34. United States v. Ballard, 322 U.S. 78 (1944). See text accompanying notes 11-14 *supra.*

35. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). While *Woody* is the first reported decision so holding, the California Supreme Court noted that an unreported Arizona case reached the same result. 61 Cal. 2d at 724, 394 P.2d at 819, 40 Cal. Rptr. at 75, *citing* Arizona v. Attakai, No. 4098 (Coconino County, Ariz., July 26, 1960).

challenged regulation to stand, the state must demonstrate both a compelling state interest in the regulation of the religious practice and the absence of less restrictive alternatives.[36] The California Supreme Court interpreted *Sherbert* to hold that while the state may abridge religious practices, it may do so only "upon a demonstration that some compelling state interest outweighs the defendants' interests in religious freedom."[37] Furthermore, in applying this balancing test the state's interest must be substantial if it is to prevail.[38] Examining the facts in the case, the court concluded that the use of peyote was absolutely central to the nature of the Native American church and that to proscribe its use was tantamount to prohibiting the religion itself.[39] Against this the court weighed the gravity of the state's interest in prohibiting the use of peyote and rejected as unfounded the state's arguments that peyote was deleterious to the Native American community and that the sanctioned use of peyote for religious purposes would place an intolerable strain on the state's enforcement of its drug laws.[40] Finally, in response to the attorney general's contention that a case-by-case inquiry into the bona fides of every defendants' religious beliefs was both unduly burdensome and contrary to the spirit of the law, the court replied that while the first amendment barred judicial inquiry into the truth or falsity of the theological tenets of any religion, an examination of the sincerity of the defendant is an accepted part of our judicial heritage.[41] Since the state had stipulated that the defendants' religious claim was bona fide, the court concluded that the free exercise clause protected the defendants' religious use of peyote from state regulation. The court stated:

> We have weighed the competing values represented in this case on the symbolic scale of constitutionality. On the one side we have placed the weight of freedom of religion as protected by the First Amendment; on the other, the weight of the state's "compelling interest." . . . The scale tips in favor of the constitutional protection.[42]

Following its decision in *Woody*, the California Supreme Court

36. 374 U.S. 398 (1963). See notes 6-8 & accompanying text *supra*.

37. 61 Cal. 2d 716, 718, 394 P.2d 813, 815, 40 Cal. Rptr. 69, 71 (1964).

38. *Id.* at 719, 394 P.2d at 816, 40 Cal. Rptr. at 72.

39. The court stated: "Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost." *Id.* at 721, 394 P.2d at 817, 40 Cal. Rptr. at 73.

40. *Id.* at 722-23, 394 P.2d at 818-19, 40 Cal. Rptr. at 74-75.

41. The court concluded: "Thus the court makes a factual examination of the bona fides of the belief and does not intrude into the religious issue at all; it does not determine the nature of the belief but the nature of defendants' adherence to it." *Id.* at 726, 394 P.2d at 821, 40 Cal. Rptr. at 77.

42. *Id.* at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77.

extended the protection of the first amendment to those who used peyote in accordance with a bona fide religious belief but who were not members of any formal religious body. The petitioner in *In Re Grady* was the self-ordained leader and teacher of a group of defendants convicted of illegal possession of peyote.[43] Granting a writ of habeas corpus, the court remanded the case for a determination of the factual question whether or not the defendant was "actually engaged in good faith in the practice of a religion."[44] The court stated that its holding in *Woody* was "that the state may not prohibit the use of peyote in connection with bona fide practice of a religious belief."[45]

The second state to conclude that the religious use of peyote should be protected was Arizona in *State v. Whittingham*.[46] The defendants were a husband and wife who were arrested for using peyote during their marriage ceremony conducted by the Native American church. State undercover agents were present in the hogan and arrested the defendants and others present during the blessing of the marriage. The lower court found that the defendants were sincere in their beliefs and that according to their beliefs a bona fide ceremony could not take place without the use of peyote. The court noted:

> The peyote is, in fact, central and primary to the ceremony. It is considered to be a sacred symbol, or divine plant around which the entire service is organized. The congregation prays to and through the peyote, which is ingested by the members of the congregation. . . . A bona fide ceremony cannot take place without the presence of peyote.[47]

However, the lower court rejected the defendants' claim that such an activity is protected under the first amendment. Accepting the lower court's determination of the facts, including the bona fide nature of the defendants' beliefs, the Arizona Court of Appeals confined its decision to the issue of whether such a practice was protected by the first amendment. Citing *Sherbert*,[48] the court reasoned that an individual has a right to the free exercise of his religion without governmental interference unless the state is able to prove that a competing state interest is strong enough to require its regulation. Furthermore, the court stated that before the issue of a competing state interest is reached, it must be established that the state regulation precludes or prohibits the free exercise of religion. Concluding that the defendants had established that the exercise of their religion had been effectively prohibited, the court noted:

43. 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964).
44. *Id.* at 888, 394 P.2d 729, 39 Cal. Rptr. 913.
45. *Id.*
46. 19 Ariz. App. 27, 504 P.2d 950 (1973), *cert. denied*, 417 U.S. 946 (1974).
47. *Id.* at 28, 504 P.2d 951.
48. 374 U.S. 398 (1963).

> [T]he trial court's findings made several determinations in which Peyotism was found to be an established religion of many centuries' history. Suffice it to say, therefore, that Peyotism is not a twentieth century cult nor a fad subject to extinction at a whim. . . . The religion is established with a following of several hundred thousand believers.[49]

Since the lower court had already determined that the free exercise of religion was seriously curtailed by the prohibition against the use of peyote, the crucial question before the court was whether the state had demonstrated a compelling reason to sustain the regulation. The court of appeals concluded that the state had "failed to sustain its burden of proof upon this issue."[50] In support of its conclusion the court pointed to the fact that expert testimony had declared peyote to be non-habit-forming and that other states had passed statutes permitting the religious use of peyote. Finally, the court stated that it had been "guided" by the California Supreme Court's decisions in *Woody* and *Grady* and quoted at length from those decisions with approval.[51]

Its evident from these cases that the religious use of peyote is protected under the first amendment as interpreted by the courts of Arizona and California. In both of these states, a Native American (and non-Native American) is able to raise a religious defense to attempted prosecution under the state's regulation of peyote whether or not he is a member of an organized or recognized religious group. However, there are some limitations on the protections given to the religious use of peyote which continue to exert a "chilling effect" on this Native American religious practice. Furthermore, it is not clear that other states will provide the basic protection guaranteed under the first amendment by the California and Arizona courts.

Limitations of the Protection of Peyote: Formal Membership

One state has held that the protection given the religious use and possession of peyote applies only if the defendant is able to supply concrete proof of his membership in the Native American church. In *Whitehorn v. State*,[52] the Oklahoma Court of Criminal Appeals reviewed a defendant's conviction for illegal possession of peyote. The defendant had appealed, claiming that he was a member of the Native American church and that the religious use of peyote by members of the church was protected by the first amendment. The court cited

49. 19 Ariz. App. at 29, 504 P.2d at 952. Interestingly, this part of the court's analysis is strikingly similar to the Supreme Court's reasoning in the *Yoder* case, yet *Yoder* is not cited in the opinion. See notes 15-18 & accompanying text *supra*.

50. 19 Ariz. App. at 29, 504 P.2d at 952.

51. *Id.* at 31-32, 504 P.2d at 954-55.

52. Whitehorn v. State, No. F-75-476 (Okla. Ct. Crim. App., June 23, 1976).

Sherbert[53] as establishing that an individual has the right to the free exercise of his religious beliefs without governmental "interference unless a contravening compelling state interest in regulation is shown."[54] Citing both *Woody* and *Whittingham*,[55] the court found that the state had failed to demonstrate a compelling state interest in unlimited regulation. However, the court confined its holding that the religious use of peyote was protected by the first amendment to "the established Native American church and its members."[56] The court then reasoned that since it was the duty of the state to enforce its drug possession laws, it was not unreasonable to require that individuals asserting a first amendment defense be required to prove that at the time of the offense they were enrolled members of the Native American church.[57] The defendant in *Whitehorn* had been able to call two members of the Native American church to testify on his behalf. Both stated that they knew the defendant to be a member of the church. The president of the Native American church in Oklahoma also testified and stated that the church had no membership rolls.[58] Emphasizing the state's interest in effective drug enforcement, the court stated:

> To require the Native American Church to keep a formal roll of its active members is not an unwarranted or unreasonable burden nor does it infringe upon the First Amendment rights of freedom of religion.[59]

The court concluded that since the defendant had been unable to "show that he was an active member of the Native American church as formally reflected by its membership rolls," the lower court had not erred in refusing to recognize that his use of peyote was protected by the first amendment.[60]

The decision in *Whitehorn* is unique in that the court did not follow the usual four-part test to determine if the state regulation impermissibly infringed on the free exercise of the defendant's religion. Instead, the court asserted a new regulation—the requirement of membership in the Native American church—and then proceeded to

53. 374 U.S. 398 (1963).

54. No. F-75-476 (Okla. Ct. Crim. App., June 23, 1976).

55. People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); People v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973), *cert. denied*, 417 U.S. 946 (1974).

56. No. F-75-476 (Okla. Ct. Crim. App., June 23, 1976).

57. *Id.* In making this requirement the court nowhere discusses the issue of whether this violates the establishment clause. See note 24 *supra*.

58. *Id.*

59. *Id.*

60. The court's ruling in effect limited the availability of this defense to Native Americans since the testimony indicated that an individual had to be a Native American to belong to the church. *Id.*

analyze the legitimate state purpose underlying this new regulation.[61] Because the Native American church is a syncretistic religion, incorporating many elements of Christian theology and worship,[62] many traditional Native American peyotists will have nothing to do with the church. Thus the court's requirement of membership in the Native American church before the religious use of peyote will be constitutionally protected in effect denies protection to Peyotists who follow more traditional Native American religious beliefs.

The Oklahoma Court of Criminal Appeals' holding that the free exercise clause protects only those users of peyote who are formally enrolled in the Native American church clearly conflicts with the California and Arizona decisions holding that the bona fide religious use of peyote is protected by the first amendment whether or not an individual belongs to any formal religious body. While *Whitehorn* contains no reference to the United States Supreme Court's decision in *Yoder*,[63] the Oklahoma court may have been influenced by the reasoning in that decision. In *Yoder*, the Supreme Court stated that the first amendment protects only religious practices and does not permit "every person to make his own standards on matters of conduct in which society as a whole has important interests."[64] While not defining the meaning of the word "religious," the *Yoder* decision reasons that the beliefs involved in that case are religious because, among other things, they are shared by an organized religious group.[65] Whether or not the Oklahoma court relied on the reasoning in *Yoder*, *Whitehorn* indicates that the constitutional protection afforded the religious use of peyote is interpreted differently by the courts of different states.

Due Process Rights

The protection given Native Americans under the free exercise clause has been rendered partially meaningless by the United States Court of Appeals for the Ninth Circuit. In *Golden Eagle v. Johnson*,[66] the Ninth Circuit ruled that a Native American in possession of peyote may still be subject to temporary incarceration even if the law specifically recognizes the right to use peyote in the practice of a religion. The defendant in *Golden Eagle* was arrested after the police had stopped his car because it lacked a license plate light. After observing "furtive movements" in the vehicle and determining that the car was not

61. The court's analysis here more closely resembles the traditional establishment clause test than the free exercise clause test. See note 24 *supra*.

62. People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

63. 406 U.S. 205 (1972).

64. *Id.* at 215-16.

65. *Id.* at 216-17.

66. 493 F.2d 1179 (9th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

registered to either the driver or the passenger, the officers searched the car preliminary to taking it into custody. Golden Eagle, the passenger, informed the officers that a wooden box in the car contained religious paraphernalia, that he was a member of the Native American church, and that he had a constitutional right to use peyote.[67] Golden Eagle was nonetheless arrested and jailed for thirty-one days. During that time he continued to assert his membership in the Native American church and suggested ways in which that membership could be verified. During the same period his landlady called the authorities and made suggestions as to how both Golden Eagle's right to use peyote and his membership in the Native American church could be proved.[68] All criminal charges against the defendant were dropped before the trial. Golden Eagle then instituted proceedings to declare such arrests unconstitutional, enjoin like future arrests, destroy certain records, and recover damages from the authorities responsible for his arrest and imprisonment. When the United States District Court dismissed six of the plaintiff's seven causes of action, he appealed. The Ninth Circuit affirmed the lower court's decision. It rejected the plaintiff's argument that, because the religious use of peyote was protected under the first amendment, any arrest required either a warrant based upon an ex parte showing that probable cause exists to believe that the possession and use of peyote is not for bona fide religious purposes or, alternatively, that the arresting officer be required to make a good faith effort to verify the sincerity of the religious claims of one found in the possession of peyote prior to placing him under arrest.[69] In asserting these procedural rights, the plaintiff relied on similar restrictions imposed by the United States Supreme Court for the seizure of allegedly obscene material.[70] Rejecting Golden Eagle's arguments, the court reasoned that these special procedures developed by the Supreme Court concerning obscene material were designed not to protect the individual from whom the seizure was made but to protect the public's right to an unobstructed circulation of books.[71] The court also declined to rule on whether the first amendment protected the religious use of peyote by assuming, "without deciding, that the interpretation of the First Amendment appearing in *People v. Woody* . . . is proper."[72] The court also noted that nowhere in *Woody* did the California Supreme Court indi-

67. 493 F.2d at 1181.

68. *Id.*

69. *Id.* at 1182.

70. *Id.* Golden Eagle relied upon a Supreme Court decision which held that before allegedly obscene material could be seized, due process required an adversary hearing preceding seizure to show that reasonable grounds existed to believe that the material was in fact obscene. *See* A Quantity of Books v. Kansas, 378 U.S. 205 (1964).

71. 493 F.2d at 1184.

72. *Id.* at 1183.

cate that any special criminal procedures were to be adopted to reduce the "chilling effect" of the California laws relating to the possession of peyote. The court of appeals reasoned:

> Certainly a belief on the part of the Supreme Court of California that its decision would require the special procedures urged on us by the plaintiff should have been revealed, or at least intimated.[73]

The court concluded that since *Woody* did not hold that regulation of peyote was unconstitutional per se, "[a]n equivalent result should not be reached indirectly by the adoption of superfluous or unworkable procedures preceding arrest and seizure."[74]

As a result of the *Golden Eagle* decision, the Native American who uses peyote in the exercise of his religion in California faces the uncertainty created by rulings of the highest state court which recognize his constitutional right to do so and an equally authoritative federal ruling that he is still subject to arrest and detention until his good faith in using peyote is established. Although the Ninth Circuit rejected Golden Eagle's argument that this creates a "chilling effect" on the free exercise of religion, in California the peyotist who practices his beliefs in good faith continues to do so at his peril.

The circuit court of appeals was undoubtedly correct in saying that *Woody* does not hold that the regulation of peyote is unconstitutional per se. However, *Woody* and *Grady* do hold that the bona fide religious use of peyote is constitutionally protected. Some procedural safeguard does seem to be required to protect those who use peyote in the exercise of their religion. One possible alternative would be to require that any individual who is arrested for possession of peyote, and who claims that he uses peyote in the exercise of his religion, be granted an immediate judicial hearing to determine the sole issue of whether such beliefs are held in good faith. Should the hearing result in a determination of good faith, the suspect would be released and all charges dropped. A determination that the beliefs were not held in good faith would be reasonable grounds to detain him for trial.

Legal Recognition of the Native American Church

In addition to the uncertainties which surround the individual Native American who uses peyote in the exercises of his religion in California and Oklahoma, the rights of Native Americans to organize into a formal church have also been subject to limitation in Arizona. *Native American Church of Navajoland, Inc. v. Corporation Commis-*

73. *Id.* at 1185.
74. *Id.* at 1186.

sion[75] recognized Arizona's power to refuse to allow the Native American church to become incorporated within the state.

When the Native American church sought a certificate of incorporation from the Arizona Corporation Commission, the church listed as one of the purposes of the proposed corporation the use of peyote within its worship. Since the use of peyote was a misdemeanor in Arizona and since the Arizona corporation law limited corporations to those which pursued a "lawful" purpose, the commission denied the certificate.[76] The members of the church then instituted a class action suit for declaratory and injunctive relief, asking that the Arizona laws regulating the use of peyote be declared unconstitutional under the first amendment and asking that the Corporation Commission be compelled to issue the church a certificate of incorporation. The United States District Court held that the denial of the certificate of incorporation did not infringe on the plaintiffs' free exercise of their religion. The court noted that the plaintiffs had not alleged that the corporate form of organization was essential to their religious practices or that they sought any of the traditional benefits of incorporation such as favorable tax treatment and limited financial liability. Since the plaintiffs had alleged no specific injury, the court reasoned that the denial of the certificate of incorporation did not constitute an actual controversy. Similarly, the plaintiffs had not alleged that there had been any past prosecutions or threat of future prosecutions under the state's drug laws because of the plaintiffs' use of peyote in their religious practices. Consequently, it was not necessary for the court to determine if the statutes regulating the use and possession of peyote were unconstitutional since this claim also failed to present an actual controversy. Characterizing the plaintiffs' suit as a "naked challenge to Arizona's drug laws," the court dismissed the suit for failing to state a claim upon which relief could be granted.[77]

This case indicates that the judicial recognition of the Native American church varies from state to state. The federal court in Arizona upheld the state authorities' denial of official recognition to the church while the Oklahoma court required an officially recognized body before first amendment protections would apply to its individual members.[78]

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75. 329 F. Supp. 907 (D. Ariz. 1971).

76. *Id.* at 909.

77. *Id.* at 910.

78. After the decision in Native American Church of Navajoland, Inc. v. Corporation Commission, 329 F. Supp. 907 (D. Ariz. 1971), which upheld the denial of a certificate of incorporation to the Native American church because the church advocated an illegal activity (the religious use of peyote), the Arizona Court of Appeals, in State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973), *cert. denied*, 417 U.S. 1946 (1974), held that the bona fide religious use of peyote is protected by the free exercise

Summary

Among the jurisdictions which have decided the issue, there is no concensus regarding the degree of protection afforded the religious use of peyote by Native Americans. Although some state courts have held that the bona fide religious use of peyote is protected by the first amendment, other courts have imposed limitations on the extent of this protection. The lack of due process requirements and the varying status of the Native American church cannot help but create uncertainty in the mind of the individual practitioner of peyotism and hence have a chilling effect on the exercise of the religion.

Hair Length

History

In the late nineteenth century the Bureau of Indian Affairs (BIA) created a system of boarding schools for Native Americans.

> [T]he express policy [of the schools was] stripping the Indian child of his cultural heritage and identity: "Such schools were run in a rigid military fashion, with heavy emphasis on rustic vocational education. They were designed to separate a child from his reservation and family, strip him of his tribal lore and mores, force the complete abandonment of his native language, and prepare him for never again returning to his people."[79]

As a party of the process of acculturation, Native American students were forced to cut their hair and adopt a European hair style.[80] The federal policy of destroying traditional tribal life styles received express congressional approval as late as 1944.[81]

Conflict

In several recent cases Native Americans have challenged state and federal regulations of hair length as unconstitutionally prohibitive of the free exercise of their religion. The courts have disagreed as to the extent of the protection accorded by the first amendment to such practices. The Court of Appeals for the Eighth Circuit has ruled that the first amendment prohibits such regulations from being applied to Native Americans whose religious beliefs require them to wear long

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clause. See note 46 *supra*. However, the *Whittingham* decision makes no requirement that to be protected the user must be a member of the Native American church. The effect of the *Whittingham* decision on the holding in *Native American Church of Navajoland* remains unclear.

79. New Rider v. Board of Educ., 480 F.2d 693 (10th Cir. 1973), *cert. denied*, 414 U.S. 1097, 1101 (1973) (Douglas, J., dissenting).

80. 480 F.2d at 696.

81. *See id.*

hair,[82] while the Tenth Circuit and one state court have held that any infringement on first amendment rights is insubstantial.[83]

In *New Rider v. Board of Education*, three Pawnee students claimed that their civil rights had been violated by a junior high school regulation which prohibited hair lengths which touched the collar or was worn in odd styles.[84] The students offered expert testimony in the trial court that long hair has a religious significance to the Pawnee and that certain traditional dances require the wearing of long braided hair.[85] The students themselves were members of a Native American dancing troupe. The leader of the student dance troupe, an old man who once traveled with Buffalo Bill's Wild West Show, had himself been the victim of a BIA boarding school in which he had been forced to cut his hair.[86] Though this case arose after the United States Supreme Court had held that judicial determinations should be limited to the sincerity of an individual's belief and is precluded by the first amendment from inquiring into the theological validity of those beliefs,[87] the court allowed defendants to introduce their own expert who testified that the wearing of long hair was not a part of Pawnee tradition or culture.[88] The superintendent of schools also testified that it would be impossible to maintain an ordered atmosphere in the public schools if the hair length regulations were required to allow for ethnic differences.[89] The lower court initially issued a permanent injunction and then reversed itself, holding that the regulation did not violate "any of the plaintiffs' rights regarding any religious creed or belief . . . ."[90] On appeal, the Tenth Circuit affirmed the lower court holding. The court reasoned that since the freedom of religious practice was not absolute, the balancing test need not be applied until some regulation impinged upon an individual's fundamental liberties. In the court's view, hair

82. Teterud v. Gillman, 385 F. Supp. 153 (S.D. Iowa 1974), *aff'd sub nom.* Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975).

83. New Rider v. Board of Educ., 480 F.2d 693 (10th Cir. 1973), *cert. denied*, 414 U.S. 1097 (1973) (Douglas, J., dissenting); Pokrywka v. Weld County School Dist., No. 24786 (Weld County, Colo. Dist. Ct., Feb. 26, 1974).

84. 480 F.2d at 695.

85. *Id.* at 696. *See also* G. WELTFISH, THE LOST UNIVERSE 492-93 (1971).

86. For an example of the way in which radically different weight is attached to the same freedom, see Douglas's dissent to the denial of certiorari in *New Rider*. 414 U.S. 1097. Justice Douglas felt that because of the past history of Native Americans being forced to abandon their traditional practices in government schools, including being forced to cut their hair, great weight should have been given to the students' interest in the free exercise of this practice.

87. U.S. v. Ballard, 322 U.S. 78, 86-88 (1943). See notes 11-14 & accompanying text *supra*.

88. 480 F.2d at 697.

89. *Id.* at 697-98.

90. *Id.* at 696.

length was not a fundamental liberty.[91] The court also expressed its fear that since the United States Supreme Court had recently held that one could be a conscientious objector to military service without subscribing to a traditional religion or creed,[92] to allow an exception to the regulation on religious grounds in this case would open the door to myriad individual objections and create a "quagmire" for local school boards.[93]

The court in *New Rider* apparently believed that the school board's interest in uniform student discipline was more compelling than the individual student's interest in the exercise of his religious beliefs. It also reasoned that to require the school authorities to recognize these Native Americans' religious objections to the regulation would put an intolerable strain on its enforcement. Yet other courts have held that similar regulations are not so brittle and are capable of withstanding the pressure of exemptions based on religious objections.[94]

Teterud v. Burnes[95] was an appeal by the warden of an Iowa state penitentiary from a lower court decision which had held that the prison's prohibition against long hair violated the first amendment rights of a Native American inmate. The appellee had initiated the litigation by seeking declaratory and injunctive relief from the prison regulation, claiming that the regulation infringed on the free exercise of his religion which required him to wear his hair long and braided. The United States District Court granted the injunction, holding that Teterud sincerely held the belief that Native American religion required him to wear his hair in braids and that there were less restrictive means which could serve the interests of the penitentiary's administration.[96] In his appeal, the warden challenged both the lower court's application of the first amendment and its findings of fact regarding the sincerity of Teterud's religious beliefs and the availability of less restrictive alternatives. The appellants argued that the Supreme Court's decision in *Yoder*[97] mandated a finding that hair style is a secular belief based on the secular considerations of racial pride and personal preference and therefore not protected by the free exercise clause. They further argued that before the free exercise clause would apply, Teterud would have to prove that the wearing of long hair is an absolute

91. *Id.* at 698.

92. United States v. Seeger, 380 U.S. 163 (1963).

93. 480 F.2d at 700.

94. Teterud v. Gillman, 385 F. Supp. 153 (S.D. Iowa 1974), *aff'd sub nom.* Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975); Pokrywka v. Weld County School Dist., No. 24786 (Weld County, Colo. Dist. Ct., Feb. 26, 1974).

95. 522 F.2d 357 (8th Cir. 1975).

96. 385 F. Supp. at 160.

97. 406 U.S. 205 (1972). See notes 15-18 & accompanying text *supra.*

tenet of Native American religion and is practiced by all believers.[98] The Court of Appeals for the Eighth Circuit rejected these arguments and cited *Yoder* as supporting their holding that "[w]hile also a matter of tradition, the wearing of long hair for religious reasons is a practice protected from government regulation by the Free Exercise Clause."[99] The court emphasized that the orthodoxy of an individual's religious belief is not for the court to determine. The court also rejected for lack of proof the prison administration's argument that the health and safety interests of the prison necessitated any infringement which might exist to the appellee's first amendment rights.[100] Thus, the court concluded, the lower court was correct in its determination that the regulation impermissibly infringed on the appellee's rights under the free exercise clause.

New Rider and *Teterud* indicate that there is a division among the circuits regarding both the extent of the protection afforded by the first amendment to Native Americans who wear long hair in the exercise of their religious beliefs and the process which the courts should use to determine if a Native American's religious claims are bona fide.[101] In *New Rider* the court engaged in inquiry to determine if the beliefs were generally recognized, while the court in *Teterud* held that the othodoxy of the individual's belief was not open to judicial examination.

While it is unclear what treatment a Native American pressing similar claims in a state court can expect, at least one state court has held that under *New Rider* the federal Constitution does not protect a Native American who challenges school hair length regulations as violative of his first amendment rights. *Pokrywka v. Weld County School District*[102] involved two Sioux brothers who were expelled from school for violating a hair length regulation. The students then sued to challenge the regulation alleging, among other things, that it violated their rights under the free exercise clause. A Colorado trial court found that there was ample evidence to prove that the plaintiff's insistence on long

98. 522 F.2d at 359-60.

99. *Id.* at 360.

100. *Id.* at 361-62.

101. The two cases can be distinguished on the facts since one deals with public school students and the other deals with a penitentiary inmate. But the court in *New Rider* upheld the hair length regulation reasoning that the school board's interest in maintaining uniform student discipline outweighed the individual students' interest in the free exercise of their religious beliefs. 480 F.2d at 700. The court in *Teterud*, on the other hand, rejected the prison warden's assertion that uniform hair length regulation was necessary to maintain both discipline and other health and safety interests in the prison. 522 F.2d at 361-62. This clearly illustrates the conflict among the circuits for, if anything, the interest of the prison authorities in maintaining uniform discipline should be *more* compelling than the corresponding interest of the school board.

102. No. 24786, at 5 (Weld County, Colo. Dist. Ct., Feb. 26, 1974).

hair was based upon religious beliefs but was not a basic tenet of an organized religion. Citing both *Yoder* and *New Rider*, the court reasoned that the Constitution protects only those individuals whose beliefs are shared by an organized religious group.[103] The court concluded that the federal precedents required a finding that the plaintiffs were not protected by the free exercise clause. However, the court found that the clause in the Colorado state constitution which guarantees freedom of religion had been interpreted more broadly and, consequently, held that the plaintiffs' religious freedom had been improperly abridged by the regulation.[104]

Summary

These cases indicate that there is a clear conflict among the courts as to the extent of the protection afforded by the free exercise clause to Native Americans who assert that uncontrolled hair length is a necessary part of their religious practice. At the center of the conflict is a disagreement over what constitutes a "religious" practice. While the Supreme Court's decision in *Yoder* emphasizes that the free exercise clause protects only *religious* practices, the Court has not established any guidelines which lower courts can use to determine whether or not a particular belief is "religious."[105] The issue seems likely to remain confused until such guidelines are established.[106]

Protected Species

A central idea underlying much of Native American religion is the unity of man with nature and the concomitant idea that man and other animals are brothers.

> We did not think of the great open plains, the beautiful rolling hills, and winding streams with tangled growth as 'wild.' Only to the white men was nature a 'wilderness' and only to him was the land 'infested' with 'wild' animals. . . . To us it was tame. Earth was bountiful and we were surrounded with the blessings of the Great Mystery.[107]

Often the sacred stories of Native Americans depict animals as messengers bearing communications from the Great Spirit.[108] Not surprisingly

103. *Id.*

104. *Id.* at 6-8.

105. See notes 15-18 & accompanying text *supra.*

106. The ambiguity surrounding the constitutionality of hair length regulations is not unique to Native Americans. Douglas, dissenting to the denial of certiorari in *New Rider*, noted that the Supreme Court has refused to review the constitutionality of hair length cases "regardless of the grounds on which the lower courts have reached their conclusions." 414 U.S. at 1098.

107. Chief Luther Standing Bear, *quoted in* V. DELORIA, GOD IS RED 105 (1973).

108. *See generally* G. WELTFISH, THE LOST UNIVERSE 159, 183-84, 316-17, 329-30, 366-67, 403-06 (1971).

then, the use of animals and animal parts is an essential part of many Native American religious ceremonies.[109] In several recent cases involving protected species, Native Americans have attempted to raise the free exercise clause as a defense to prosecutions for illegal taking, possession, and sale of certain animal parts. In cases involving animals which are an endangered species, there is general agreement that there is no valid first amendment defense to prosecutions for sales of protected animal parts. What remains unanswered is whether the mere taking or possession of endangered species which are necessary to the practice of Native American religion may be regulated or whether the free exercise clause prohibits Native Americans from being prosecuted for violating such regulations.[110] In a case involving a state regulation concerning the taking and possession of a nonendangered species, one state court has held that such a statute impermissibly infringes on the free exercise of the religion of Native Americans who require the animal in the practice of their religion.[111]

Eagle Feather Cases

In *United States v. Bushyhead*,[112] the defendants were charged with selling eagle parts in violation of the Migratory Bird Treaty Act. The defendants were arrested when they sold eagle feathers to white undercover agents of the Department of Interior. The defendants filed a motion to dismiss the complaint contending that the statute was overbroad and could not constitutionally be applied to them because it infringed on the free exercise of their religion.[113] The court rejected the claim that the statute unconstitutionally infringed on the free exercise of their religion by pointing out that the defendants were not charged with possession or even sales to fellow Native Americans but sales for profit to white undercover agents. Observing that the defendants were "not so bold as to suggest that the sales were required reli-

109. *Id.* *See also* V. DELORIA, GOD IS RED 102-04 (1973).

110. *See* Note, *Native American Culture: The Use of Feathers As a Protected Right*, 2 AM. INDIAN L. REV. 105, n.2 (1974). The author of the note argues that the Migratory Bird Treaty Act, 16 U.S.C. §§ 703, 704 (1970), which prohibits the possession or sale of eagles or their feathers except under such regulations as the Secretary of Interior might make, unconstitutionally infringes on the free exercise of Native American religion.

111. Order Reversing Decision, Wisconsin v. Funmaker, No. 003042 (Juneau County, Wis. Cir. Ct., July 23, 1976).

112. United States v. Bushyhead, Magistrate's No. 74-117M (W.D. Okla., June 18, 1974).

113. With respect to the defendants' contention that the statute was overbroad and abridged free speech, the federal district court held that the statute regulated conduct, not speech, and that it was not so vague that it might be susceptible of application to the defendants' expression of their religious beliefs. Consequently the court held that the overbreadth doctrine did not apply. *Id.* at 6.

gious practice,"[114] the court concluded that the defendants had not presented a bona fide religious claim for exemption from prosecution. The court noted:

> While too many Americans of all races, perhaps, worship the dollar and the pursuit of profit has for them become a way of life, we do not believe that First Amendment Rights are thereby implicated. The First Amendment protects religious beliefs and opinions but it is not a license to commit criminal acts.[115]

The court carefully limited its holding concerning the free exercise clause to the particular offense charged and noted that it had not been required to decide if the statute could constitutionally be applied to Native Americans charged with mere taking or possession.[116]

A similar result was reached in *United States v. Top Sky*.[117] The defendants, charged with the sale of eagle parts, filed a motion to dismiss the complaint alleging that the statute violated the free exercise clause.[118] They argued that requiring them to get a permit before they could take or possess eagle parts was an unconstitutional prior restraint on the exercise of their first amendment rights. The court rejected this argument, noting that any burden imposed on the free exercise of the defendants' religion was minimal when weighed against the state interest in curtailing widespread dissemination of eagle parts. Observing that the defendants were not charged with taking or possession but with sales, the court stated that "the act of selling is deplored by the Indian religion"[119] and dismissed the petition for failing to present a bona fide religious issue.

Since the decisions in both *Bushyhead* and *Top Sky* were issued in cases in which the defendants were charged with sales, it is not clear whether a similar result would be reached if a Native American were charged with taking or possession of eagle feathers in the exercise of his religion without first obtaining the required permits. While the *Top Sky* decision did comment that the burden imposed by the required permits was outweighed by the government's interest in preventing the

114. *Id.* at 7.

115. *Id.* at 7-8.

116. *Id.* at 8.

117. United States v. Top Sky, No. 4-75-4 (D.C. Idaho, July 17, 1975).

118. The defendants also alleged that the statute violated the establishment clause. Citing the tripartite test of Lemon v. Kurtzman, 403 U.S. 602 (1971), the district court held that since the defendants were charged with sales and not mere possession, and since the statute specifically permits Native Americans to apply for permits to take and possess eagle parts, 16 U.S.C. § 668 (1971), the statute had the requisite neutral effect on religion. The court also dismissed for want of actual controversy the defendants' contention that the third part of the *Lemon* test had been violated, holding that the case did not demonstrate excessive governmental entanglement with religion. United States v. Bushyhead, No. 4-75-4, at 2-3 (D.C. Idaho, July 17, 1975).

119. United States v. Bushyhead, No. 4-75-4, at 3 (D.C. Idaho, July 17, 1975).

widespread dissemination of eagle parts, that statement was not necessary to its holding since the defendants were charged only with sales. And the court in *Bushyhead* carefully refrained from deciding whether the free exercise clause could be raised as a valid defense in a prosecution for mere taking or possession. The two cases clearly state that the free exercise clause does not protect those charged with sales of controlled animal parts, but they provide no authoritative holding on whether or not the religious *use* of protected animal parts may be validly regulated.

One state court has held that a state fish and game regulation which required similar permits for the taking of deer unconstitutionally infringed upon the free exercise of the religious beliefs of Native Americans who required deer parts for the performance of their religious rituals. The War Bundle Feast is one of the principal celebrations of the Winnebago tribe. In connection with the feast, deer are hunted. Both the ritual of the hunt and the preparation and use of the deer parts are minutely prescribed by Winnebago religious beliefs.[120] In *Wisconsin v. Funmaker*,[121] the defendant, a Winnebago, was charged with possession of a deer carcass in violation of a state regulation which required hunting permits and the tagging of all deer killed. He pleaded not guilty and moved to dismiss the complaint on the grounds that the statute infringed on the free exercise of his religion. The trial court rejected the defendant's claims and sentenced him to thirty days in jail. On appeal, the state circuit court reversed the conviction. Citing *Ballard*[122] and *Yoder*,[123] the court reasoned that the defendant had established that his beliefs were held in good faith and that the nonregulated hunting of the deer was necessary to the practice of his religion. Since these two requirements were satisfied, the court next reasoned that *Sherbert*[124] establishes that before a religious practice may be regulated, the individual's interest in the free exercise of his religion must be outweighed by a compelling state interest of the highest order. Observing that the testimony in the case indicated that the entire Winnebago tribe would require not more than 264 deer annually for the exercise of their religious beliefs and that the state allowed over 90,000 deer to be hunted annually for sport, the court concluded that the defendant's interest in the exercise of his religion outweighed any

120. The night before the hunt, all the hunters participate in a sweat lodge ritual. Both the hide and the meat are used in the celebration of the feast and at the end of the feast the specially prepared hide is taken into the forest and left as an offering to the Great Spirit. *See generally* Order Reversing Decision, July 23, 1976, Wisconsin v. Funmaker, No. 003042 (Juneau County, Wis. Cir. Ct.).

121. *Id.*

122. 322 U.S. 78 (1943).

123. 406 U.S. 205 (1971).

124. 374 U.S. 398 (1962).

interest which the state had in its regulation. Consequently, the court held that the first amendment protected the defendant and reversed his conviction.

Summary

The decision in *Funmaker* is readily distinguishable from *Top Sky* and *Bushyhead* on the facts involved in the cases. In the latter two cases the holding was that the free exercise clause did not protect the defendants from prosecution for sales, while in *Funmaker* the holding was that the defendant was protected from prosecution for mere taking and possession. Additionally, *Top Sky* and *Bushyhead* concerned an endangered species while *Funmaker* did not. Yet to observe only these factual distinctions is to miss the more serious issue which the cases leave unsettled. *Funmaker* holds that in cases where the use of animal parts is a practice necessary to the free exercise of the defendant's religion, the free exercise clause may be raised as a defense to prosecution for taking and possession of a protected species. While neither *Top Sky* nor *Bushyhead* was required to decide the issue, language in both opinions indicate that in a prosecution for mere taking or possession of an endangered species the court would be required to balance the society's interest in animal protection against the Native American's interest in the free exercise of his religion. In light of the fact that animals and animal parts play an important role in Native American religious practices, it is likely that the balancing of these two competing interests will continue to confront the courts.

Conclusion

The Supreme Court has stated that the purpose underlying the free exercise clause of the first amendment is to guarantee the widest possible exercise of religious practices consistent with ordered liberty.

> The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. . . . The First Amendment does not select any one group for preferred treatment. It puts them all in that position.[125]

Operating on this basic premise, the Supreme Court has developed a four-part test to determine when a religious practice is protected by the first amendment. First, it must be established that the religious beliefs are held in good faith.[126] Second, if the conduct is to be protected,

125. United States v. Ballard, 322 U.S. 78, 87 (1943).
126. *Id.* at 84.

it must be part of the practice of a religion.[127] Third, the religious importance of the conduct must be balanced against the compelling state interest in its regulation.[128] And fourth, for any regulation to be upheld the state must demonstrate that there is an absence of less restrictive alternatives to the regulation.[129]

At present no guidelines exist to determine two key elements in the above test: what constitutes a religion and what criteria can be used to determine the relative weight to be attributed to the individual's interest in the free exercise of his religion and the state's interest in its regulation.

This note has examined the way in which the state and federal courts have applied the existing four-part test to cases involving Native American religious practices. In cases involving the bona fide religious use of peyote, some courts have held that the practice is absolutely protected from governmental regulation while other courts have held that the state's interest in regulation mandated that restrictions be placed on the free exercise of the practice. In those cases dealing with state regulation of hair length, some courts have held that an individual's wearing of long hair is a religious belief protected by the free exercise clause while other courts have held that hair length is not necessary to the practice of a religion or that any infringement is not weighty enough to be protected by the free exercise clause. In the one area where the decisions have been consistent, the cases involving animal protection, the relative weight to be attached to the competing interests involved remains undecided.

All of the areas discussed involve a delicate balancing test to determine if a particular religious practice should be protected from governmental interference. The United States Supreme Court has indicated that two crucial factors should be considered as resting on opposite sides of the symbolic scale of justice. On the one side are the interests of the individual Native American in the free exercise of his religion. On the other side are the state's interests in enforcing some regulation under its police power. While all of this seems very clear in principle, its application is no mean task. It is evident that in any balancing the way in which the scale will tilt depends on the weight which is given to the items which are on each side of the scale. In the area of the first amendment the relative weights attached to the items on both sides of the balance are often influenced by unspoken philosophical considerations. This is clearly indicated by the fact that in the cited cases identical values were given different weights by different

127. 406 U.S. at 215-16.
128. 374 U.S. 398 (1962).
129. *Id.* at 407.

courts. Indeed, all of the lower court decisions which were reversed on appeal were reversed not because the appellate court disagreed with the lower court's principles of law but because the appellate courts attached different weight to some factor on one side of the balance.[130]

Furthermore, all of the cited cases involve the problem of determining what constitutes a religious belief. In some of the decisions, the courts have been willing to recognize as religious any belief which was so characterized by the individual who held it provided it was held in good faith. Other courts have demanded that some recognized religious group share the belief if it is to be religious.[131] The language in the *Yoder* decision which emphasized that the free exercise clause protects only those practices which are based on the exercise of a *religion* seems to have confused rather than clarified the issue.

In an area as sensitive as the area of freedom of religion there is a need for concise standards which will enable the courts to protect with uniformity the rights of the individual. Using the standards thus far established by the Supreme Court, the lower courts have been unable to agree on the extent of the protection afforded by the first amendment to Native American religious practices.

It is possible that a solution to this problem could be aided by another decision of the Supreme Court. In *Morton v. Mancari*, the Court held that the recognized Native American tribes were political organizations warranting judicial consideration.[132] They might also be held to be cultural organizations with established traditions and histories of religious practice. While this would not resolve the problems which inevitably arise when an individual asserts a religious belief which is unique to himself, it would provide a means of determining that a belief is religious when it is supported by the cultural and religious history of the individual's tribe. In addition, the weight to be attached to the asserted practice could be determined by examining the importance of the practice to the history and culture of the tribe. Once the religious nature and importance of the practice have been determined, the

130. Teterud v. Gillman, 385 F. Supp. 153 (S.D. Iowa 1974), *aff'd sub nom.* Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975); State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973), *cert. denied*, 417 U.S. 946 (1974); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); *see generally* Order Reversing Decision, July 23, 1976, Wisconsin v. Funmaker, No. 003042 (Juneau County, Wis. Cir. Ct.).

131. *See generally* New Rider v. Board of Educ., 480 F.2d 693 (10th Cir. 1973), *cert. denied*, 414 U.S. 1097 (1973) (Douglas, J., dissenting); State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973), *cert. denied*, 417 U.S. 946 (1974); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); Pokrywka v. Weld County School Dist., No. 24786 (Weld County, Colo. Dist. Ct., Feb. 26, 1974); Whitehorn v. State, No. F-75-476 (Okla. Ct. Crim. App., June 23, 1976).

132. 417 U.S. 535, 553-54 (1974).

balancing of the individual's interest in the free exercise of his religion with the state's interest in its regulation can be more clearly resolved. It is to be hoped that the Supreme Court will consider this problem in light of its holding in *Mancari* and will act soon to more clearly define what constitutes a Native American religious practice and to establish criteria which may be used to determine the relative weight to be given the competing interests involved whenever a state regulation affects the free exercise of Native American religion.

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